MOHD KHIRUDIN YAAKUB

v.

SUPERINTENDANT OF CENTRAL PRISON KUCHING & ORS

HIGH COURT SABAH & SARAWAK, KUCHING
RHODZARIAH BUJANG J
[SUIT NO: KCH-22-114-5-2012]
4 JULY 2013

CRIMINAL PROCEDURE: *Warrant - Warrant of commitment - Plaintiff sentenced to one year imprisonment and fine of RM10,000 in default six months' imprisonment - Warrant of commitment stated failure to pay fine - Whether fine paid - Plaintiff committed to prison for default of payment - Whether prison warden informed about payment of fine - Whether prison officers justified in taking warrant of commitment at face value without verifying with court*

DAMAGES: *Assessment - False imprisonment - Plaintiff's imprisonment of one year extended to another six months - Allegation that extended incarceration caused mental illness - Claim for general, exemplary and aggravated damages - Whether mental illness caused by default sentence or extended incarceration - Whether damages claimable*

TORT: *False imprisonment - Unlawful imprisonment - Conviction under s. 11(a) Anti-Corruption Act 1997 - Sentence of one year imprisonment and fine of RM10,000 in default six months' imprisonment - Warrant of commitment stated failure to pay fine - Plaintiff paid fine but committed to prison for default of payment - Whether prison warden informed - Whether there was breach of reg. 24 Prison Regulations 2000 - Whether plaintiff falsely imprisoned - Prisons Act 1995, s. 29*

The plaintiff, an enforcement officer, was convicted for an offence under s. 11(a) of the Anti-Corruption Act 1997 and was sentenced to one year imprisonment and a fine of RM10,000 ('the fine') in default six months' imprisonment. On appeal, the High Court granted a stay of execution of the imprisonment sentence on the condition that the plaintiff pays the fine on the following day. The plaintiff duly complied with the condition but was still committed to prison. Upon his release from prison, the plaintiff filed this action against the defendants for false imprisonment. The

plaintiff alleged that although he had paid the fine, he was incarcerated for an additional six months as the warrant of commitment stated that he had failed to pay the fine. Upon his admission to prison, the plaintiff had informed the attending prison warden ('the prison warden') of this but was ignored. The plaintiff asserted that this was a breach of reg. 24 of the Prison Regulations 2000 ('the Regulations'). The defendants, however, averred that the plaintiff's contention of a breach of the Regulations was never pleaded and should not be considered by the court. The defendants also submitted that the prison officers had no choice but to obey what was stated in the warrant of commitment at its face value, as was required of them by virtue of s. 29 of the Prisons Act 1995. The issues that arose for the court's determination were, *inter alia*, (i) whether the plaintiff had informed the defendants, upon his admission, about the payment of the fine; and (ii) whether the prison officers were justified in taking the warrant of commitment at its face value.

Held (dismissing plaintiff's claim):

(1) The alleged breach of the Regulations gave no added value to the plaintiff's action as it was founded upon the prison officers' blind adherence to the remark in the warrant of commitment that the plaintiff did not pay the fine and their refusal to give credence to his assertion to them that he had paid the fine. Further, it was not a case where the plaintiff had failed to pay the fine and was sent to prison for the default sentence and upon admission, was not informed of the means in which he could be released from serving the default sentence. (para 6)

(2) The plaintiff was not just any illiterate prisoner from the street but an enforcement officer with a government department who was, at one point in time, enforcing the law. It was highly improbable that he would have affixed his thumbprint on a document which contained a material and false particular - that he did not pay his fine. It was equally improbable that if he had been ignored by the prison warden about the payment of the fine, he would have kept quiet about it, given his background. His wife visited him every month. In addition to that, the prison board of visitors also visited the prisoners on a monthly basis. Given his background, the plaintiff could not have failed to make use of the opportunity to look for redress. (para 9)

(3) The prison officers and hence, the defendants in this case had no obligation to go beyond what was stated in the warrant. They might have had the moral duty to verify from the court should a doubt arise as to the correctness of the content of the warrant but they did not have the corresponding duty to verify if each and every warrant of commitment is correct. Thus, the plaintiff had failed to prove an element in false imprisonment, *ie*, that his extra detention was unlawful. (para 16)

Case(s) referred to:

Boonsoom Boonyanit v. Adorna Properties Sdn Bhd [1997] 3 CLJ 17 CA ***(refd)***

Broome v. Cassell & Co. Ltd [1972] AC 1027 ***(refd)***

Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) & Other Appeals [2012] 2 CLJ 16 CA ***(refd)***

Henderson v. Preston [1888] 21 QBD 362 ***(refd)***

Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors [2009] 1 CLJ 663 FC ***(refd)***

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***

Manga v. Attorney General [2000] 2 NZLR 65 ***(refd)***

McGrath v. Chief Constable of the Royal Ulster Constabulary & another [2001] 4 All ER 334 ***(refd)***

Mohamad Ezam Mohd Nor & Ors v. Tan Sri Norian Mai & Ors [2013] 3 CLJ 81 HC ***(dist)***

Olotu v. Home Office & Another [1997] 1 All ER 385 ***(refd)***

Rookes v. Barnard [1964] AC 1129 ***(refd)***

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***

Legislation referred to:

Anti-Corruption Act 1997, s. 11(a)
Evidence Act 1950, s. 114(g)
Internal Security Act 1960, s. 73(1)
Prison Act 1995, ss. 29, 65(3)
Prison Regulation 2000, reg. 24

Prosecution of Offences Act 1985 [UK], s. 22

For the plaintiff - Lim Heng Choo (Anthony Tai with him); M/s Lim & Lim Advocates
For the defendant - Mohd Taufik Mohd Yusoff; SFC

Reported by Najib Tamby

A

JUDGMENT

Rhodzariah Bujang J:

[1] Marshalling the basic facts which constitute the foundation of this action is an easy task as they were all agreed. It is however, a rare case as there are no reported decisions of its kind in our jurisprudence and the legal dispute arose this way.

Background Facts

[2] As an enforcement officer with the Road Transport Department, Kuching the plaintiff was convicted, on 9 April 2008, for an offence under s. 11(a) of the Anti-Corruption Act 1997 and was sentenced to one year imprisonment and a fine of RM10,000 in default six months' imprisonment. His sentence was stayed pending an appeal to the High Court against both the conviction and sentence. The appeal was eventually heard on 10 March 2009 and the High Court dismissed the appeal, affirmed both the conviction and sentence and granted a stay of execution of the imprisonment sentence on the condition that he paid the RM10,000 by 4pm the following day, ie, 11 March 2009. The plaintiff duly complied with the condition. The Court of Appeal which sat on 29 November 2010 also dismissed his appeal and likewise maintained the sentence imposed by the Sessions Court. Since that was as far as he could go in challenging the decision of the Sessions Court, the plaintiff was committed to prison on the same day by a warrant of commitment signed by the Deputy Registrar of the Court of Appeal.

[3] The plaintiff has upon his release from prison on 29 November 2011, filed this action against the Superintendent of the Prison Puncak Borneo, its Director and the Government of Malaysia for false imprisonment and this judgment is in respect of that action. Why he did so is because he was incarcerated for an additional six months for failing to pay the RM10,000 fine, although as stated earlier he did pay the fine and why the blatant omission was simply because the warrant of commitment states in triple asterisks above the signature of the learned Deputy Registrar that "Accused failed to pay the court fine". The plaintiff alleged that upon his admission to prison he had informed the attending prison warden (identified at the trial by the defendants' witnesses as one Walter) that he has paid the fine but was ignored. Prison

warden Walter was the one who did the calculation of the days the plaintiffs had to serve based on the warrant of commitment and the earliest date upon which he would be released based on the said warrant. That record was tendered at the trial as exh. D2. It was co-signed by Assistant Superintendent of Prison, Azmi bin Mahat (DW2), hereinafter referred to as ASP Azmi. That, other than the evidence on the records, was in essence also the plaintiff's evidence at the trial which included his allegation that the prison wardens were negligent in the discharge of their duties by not ascertaining with the court whether he had indeed paid the fine. At the trial, and this was repeated in his counsel's written submission after it concluded, a breach of reg. 24 of the Prison Regulation 2000 was alleged against prison warden Walter and against ASP Azmi. Prison warden Walter was not called as a witness. His absence merited a point of submission of its own by the plaintiff but I would deal with the alleged breach of reg. 24 first.

Regulation 24

[4] This Regulation provides as follows:

> A prisoner committed to prison in default of paying a sum of money or for want of surety shall, on admission be informed of the means whereby he may obtain his release but until he obtains his release every such prisoner shall be subject to these Regulations.

[5] Both witnesses for the defendants, the first one being Superintendent of Prison of Penjara Puncak Borneo, Fathi bin Mursidi (DW1) and the second, ASP Azmi admitted that they were not aware of this Regulation but both insisted that the plaintiff had been informed that he would not serve the default sentence if he had paid the fine. In other words, there was compliance with the legal provision although they were not aware of its existence.

[6] Worrying maybe their ignorance of the law which governs their profession, however the learned Federal Counsel, Mr Mohd Taufik bin Mohd Yusoff (Mr Mohd Taufik for short) submitted that a breach of this Regulation was never pleaded and should not therefore be considered. I would respectfully disagree because when this breach was brought up during the cross-examination of the defendants' two witnesses, it was never objected to and it is

trite law only material facts must be pleaded; not the law. Furthermore, contrary to Mr Mohd Taufik's assertion in his written submission, evidence of the Regulation was merely brought up to reinforce the plaintiff's case that he was not informed of his right to be released upon payment of the fine, not that his action for false imprisonment was founded upon breach of the said Regulation. When I examined his statement of claim and his evidence at the trial, I am of the view that the alleged breach of the Regulation gives no added value to the plaintiff's action herein for the simple reason that it was founded upon the prison officers' blind adherence to the asterisk remark in the warrant of commitment that he did not pay the fine and their refusal to give credence to his assertion to them that he had paid the fine. It is not the case of him failing to pay the fine and was sent to prison for the default sentence and upon admission was not informed of the means in which he could be released from serving the default sentence. Thus, the pertinent question which I must address my mind to is, firstly whether he had indeed informed them, upon his admission, about the payment of the fine and secondly, whether the prison officers were justified in taking the warrant of commitment at its face value.

Payment Of The Fine

[7] Both sides were adamant that they were right. The plaintiff said he did inform his jailors about his payment of the fine whilst the two defendant witnesses said he did not. The plaintiff's counsels, Mr Lim Heng Choo and Mr Anthony Tai in their joint written submission submitted that their client's evidence should be believed because prison warden Walter was not called by the defendants as a witness and therefore an adverse inference should be drawn against the defendants for that failure. Mr Mohd Taufik however countered by saying that prison warden Walter was not a material witness to this case because of what was so clearly stated in the warrant of commitment and further he was not named as a defendant in this case. He should have been named, Mr Mohd Taufik further added, in order for the defendant to be vicariously liable, citing the Federal Court case of *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663 which held that in tort cases the officer responsible for the negligence or the tortious wrong must be named before the Government can be held vicariously liable. It is a legal proposition which I am hard pressed not to disagree, emanating as it were from the highest court in the land.

[8] Whilst, it is indeed true that prison warden Walter would have been able to shed a brighter light on the said allegation of the plaintiff, however, I am not minded to draw that adverse inference under s. 114(g) of the Evidence Act 1950 for the reason that firstly (as alluded to above), the plaintiff had never named him as a defendant in this case. I agree with Mr Mohd Taufik that this recourse should have been taken by the plaintiff right from the start of his action by pleading in his statement of claim that his statement to the prison warden admitting him that he has paid the fine was ignored. No such material fact was pleaded by him in the statement of claim. The omission to plead it is in my view fatal to his right to invoke the adverse inference and to his claim herein. Invocation of the adverse inference is also futile because prison warden Walter was not the only prison officer who met the plaintiff upon his admission. ASP Azmi did too and what is more he had the documents to prove it - exh. D2 which I mentioned earlier and even more importantly, exh. D3. Exhibit D3 is a document which contained the detailed particulars of the warrant. It is dated 30 November 2010 and in it was also stated that the plaintiff had failed to pay the fine. That is not as important as another crucial factor and that factor is that the plaintiff had thumb printed on the document as is clearly shown on the document and stated by ASP Azmi in his testimony. The plaintiff never called any rebuttal evidence on this fact and did not explain at all his thumbprint on the said document. As his counsel have correctly submitted right at the start of their joint submission, oral evidence must be tested against contemporaneous documentary evidence, citing the Federal Court case of *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229, *Boonsoom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 3 CLJ 17 as well as *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97. Again, case authorities which I am surely bound by legal precedent to follow.

[9] It is the prison department standard operating procedure, said the two witnesses of the defendant, to explain the content of the warrant of commitment to the prisoner upon admission. The plaintiff admitted that this procedure was adhered to except that he was ignored when he explained that he has paid the fine. Now, the plaintiff is not just any illiterate prisoner from the street but an enforcement officer with a government department who

himself was, at one point in time, enforcing the law. It is highly improbable that he would have affixed his thumbprint on a document which contained a material and false particular – that he did not pay his fine. It is equally improbable that if he had been ignored by prison warden Walter about the payment of the fine he would have kept quiet about it given his background. Contrary to his allegation, he was not hapless and helpless. His wife, as rightly pointed out by Mr Mohd Taufik visited him every month as he readily agreed in his evidence. He could have alerted her to seek legal redress for the omission. Then there is the prison board of visitors who also visited the prisoners every month as is required by s. 65(3) of the Prison Act 1995. Given his background as I said earlier, he could not have failed to make use of the opportunity to look for redress particularly when the board visited the prison after his main imprisonment term has lapsed. I regret to say that his failure to avail himself of these opportunities appear to me to make him the architect of his own doom. The drawing of this conclusion is bolstered by this second and last consideration on the warrant of commitment.

The Warrant Of Commitment

[10] This is the area of law which is new in our jurisprudence - not that on false imprisonment where the authorities are aplenty. I must at the outset record my sincere appreciation to the diligence of Mr Mohd Taufik who has unearthed case authorities from the English Courts for my guidance in resolving this issue. Though not binding but being cases on the point, they are compellingly persuasive and I drew much assistance from their *ratio*. They echoed my first and instinctive reaction when I first read the pleadings in this case, which was that a court order must be respected and obeyed, unless set aside. Although the basis of that reaction is my understanding drawn from court orders in civil cases as for example in the Court of Appeal's decision in *Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) & Other Appeals* [2012] 2 CLJ 16, a doubt which followed that reaction, ie, whether the same principle applies to a warrant of commitment was removed and resolved when I read the English cases submitted by Mr Mohd Taufik.

[11] The basic argument of Mr Mohd Taufik based on these cases is this: the prisons officers have no choice. They have to obey and follow what is stated in the warrant of commitment. The premise of that obedience is our s. 29 of the Prison Act 1995 which provides as follows:

> An officer in charge shall keep and detain a person duly committed to his custody by a court or competent authority **according to the terms of the warrant or order by which the person has been committed** or until the person is discharged by due course of law. (emphasis added).

[12] The case of *Henderson v. Preston* [1888] 21 QBD 362 cited by the House of Lords in *McGrath v. Chief Constable of the Royal Ulster Constabulary & another* [2001] 4 All ER 334 is the case in point which nailed the coffin in this case. The latter cited case concerned a case of mistaken identity ie, where a man was arrested pursuant to a warrant of arrest issued against another for failure to turn up in court for sentencing and he brought an action for *inter alia*, wrongful arrest, against the Chief Constable and the Constabulary. The former was an action of also false imprisonment against the prison governor for detaining the plaintiff for an extra day because he was sent to prison a day after his sentence was to commence. Lindel LJ in Henderson's case pertinently said at p. 366 of the report as follows:

> All that one has to do is to read the warrant. What is a governor of a goal who receives such a warrant to do except to obey it? It is perfectly valid and correct, and is authorized by the Act of Parliament, and issued by persons who have jurisdiction to issue it. It appears to me that the governor by obeying that warrant has simply done his duty, and the warrant protects him and is an answer to the action.

[13] Lord Clyde in *Mc Grath*'s case continued, after producing the quotation above to state as follows:

> [17] Warrants issued by a court of law require to be treated with the same respect as must be accorded to any order of the court. The general rule was stated by Romer LJ in *Hadkinson v. Hadkinson* [1952] 2 All ER 567 at p. 569, [1952] P 285 at p. 288:
>
> > It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until

A that order is discharged. **The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even *void*.** (emphasis added).

B **[14]** Lord Esher MR emphasised this point further when he said:

> In the case of *Olliet v. Bessey* (1) decided about 200 years ago, it was so held, and from that day to this **no action can be found in the books to have been maintained against a gaoler where he acted within the terms of the warrant**. That is sufficient to
C determine this case. Whether the plaintiff had any and, if so, what remedy, is a matter we need not inquire into: in any case this action will not lie. The appeal must, therefore, be dismissed. (emphasis added).

D **[15]** Additionally, Mr Mohd Taufik submitted that the prison officers have no alternative but to take the warrant of commitment at its face value. He cited the English Court of Appeal case of *Olotu v. Home Office & another* [1997] 1 All ER 385 which was a decision in respect of also a case on false imprisonment where the
E plaintiff was detained after the time limit for her custody under s. 22 of the Prosecution of Offences Act 1985 and the Regulation made thereunder, has expired. But, because the warrant of commitment states that she was to be kept in custody until she was delivered to the Crown Court 'in due course', Lord Bingham
F of Cornhill CJ held as follows:

> The plaintiff was in the custody of the Crown Court. Only by order of the court could that period of custody be brought to an end. Once the custody time limit had expired without extension, the Crown Court would have been obliged to order the release of
G the plaintiff, but such release would have been on bail and the Crown Court could have imposed terms with which the plaintiff would have been obliged to comply after release. Once the custody time limit had expired, the plaintiff was in my view unlawfully detained, and an order which would have led to her
H release could have been obtained either from the Crown Court or from the Divisional Court; but it does not follow that in the absence of any such order the governor was guilty of falsely imprisoning the plaintiff and in my view he was neither entitled nor bound to release her.

I

[16] It is clear from this line of authorities that the prison officers and hence the defendants in this case have no obligation to go beyond what is stated on the warrant. They may have the moral duty to verify from the court should a doubt arises as to the correctness of the content of the warrant but they do not have the corresponding legal duty to verify if each and every warrant commitment is correct. Mr Mohd Taufik is again right when he said that to impose on them that legal obligation is too strenuous and burdensome; not to mention impractical. The duty, I must add lies with the court officer who signs the court order or the warrant as in this case - to ensure that it is correct in its details. In this case, the case numbers assigned to the Court of Appeal file shows that the High Court order granting the condition of bail was made in the same High Court appeal file. This simply means that the said High Court order must have been in the Appeal Record of the Court of Appeal. The learned Deputy Registrar should have been alerted of the condition on the payment of the fine made by the High Court. With respect, it was the court officer's inadvertence or inattention while performing his/her duty which unfortunately precipitated the chain of events which led to the filing of this case.

[17] Accordingly, for all the above reasons and on the strength of the cases cited, I find that the plaintiff has failed to prove the second element in false imprisonment ie, that his extra detention was unlawful although I agree that the first element, ie, that his liberty was restrained was proved as it was not even challenged by the defendants. The plaintiff's claim is therefore dismissed and I do so with cost of RM20,000.

[18] Assuming I was wrong in so deciding, I will move now to consider his claim for damages.

Damages

[19] The plaintiff claimed all three heads of damages – general, exemplary and aggravated. At the outset, I must state that the last two heads of damages, by reason of their definitions are not claimable. The prison officers have not been proved to have behaved in such a way and in a manner as to merit the award of damages to punish them-conduct which came within the principle established in *Rookes v. Barnard* [1964] AC 1129 for exemplary

damages. As for aggravated damages, also meant to punish, said Lord Diplock in *Broome v. Cassell & Co Ltd* [1972] AC 1027 but heightened by the manner and motive of a defendant when causing the injury to the feelings or reputation of the plaintiff, again in the facts of this case it is unjustified for no such manner or motive surfaced at the trial. The plaintiff herein was already incarcerated under the imprisonment term of one year and his evidence and that of his doctor, Dr Tan Cheow Hwa (PW2) that he suffered depression following his imprisonment could not be attributed to the default sentence as he was legitimately undergoing the one year imprisonment also. The mental illness he suffered, in other words, was not severable as between the incarceration proper and the default sentence.

[20] With no intention whatsoever of making light of his needless additional imprisonment, nor undervaluing the seriousness of his debilitating mental illness, presented by symptoms such as insomnia and feeling of worthlessness as testified by Dr Tan Cheow Hwa, I would think that general damages should be calculated not per day but by way of a global sum as the New Zealand Court did in *Manga v. Attorney General* [2000] 2 NZLR 65, another case submitted by Mr Mohd Taufik. The facts of that case is almost similar in that Manga who was initially lawfully incarcerated was kept in prison an extra 252 days after his lawful imprisonment term has expired due to a misinterpretation of the law by the relevant department. A global sum of $60,000 was awarded to him taking into account, *inter alia*, that his repeated protest of the unlawfulness of his extra detention had fallen on deaf ears and causing him to suffer shock, distress, humiliation, fear and anger. The plaintiff in this case before me, it must be noted never did pursue such relentless endeavour to free himself from the additional days of incarceration.

[21] I acknowledge that Lau Bee Lan J in *Mohamad Ezam Mohd Nor & Ors v. Tan Sri Norian Mai & Ors* [2013] 3 CLJ 81 had awarded RM15,000 per day for the unlawful detention of the plaintiffs under s. 73(1) of the Internal Security Act 1960 but the facts of the said case are distinguishable in the sense that the detention right from the start was unlawful to begin with.

[22] Before expressing my view on what I deem as the appropriate damages in this case, I must first settle one relatively minor point raised by the plaintiff's counsel which is that the period of false imprisonment to be considered by the court is to include both the period of 15 days when the plaintiff was out on parole right up to the date I deliver the judgment. With respect I am unable to accede to the said argument. Not only because it goes against the very grain of what constitutes false imprisonment, which is the complete deprivation of liberty without lawful excuse as defined in *Clerk and Lindsell on Torts* but it is akin to hanging a sword of damocles above the judge's head - to make his or in this case, my decision in haste, so as not to unfairly enhance the damages awarded to the detriment of the defendants. I said 'unfairly' because for all intents and purposes the plaintiff during these impugned periods was a free man. Thus, in my view, the relevant period for my consideration is 104 days minus 15 days, the period when the plaintiff was out on parole, ie, 89 days. For these number of days, I am of the view, given the plaintiff's own inertia over his predicament and taking into account too that the said predicament was precipitated by the inattention to details of the learned Deputy Registrar, the damages should be no more than RM300,000.

[23] However, for the reasons as stated earlier, the plaintiff's claim is dismissed.